No. 98-1137

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta), GREEN TURTLE (Chelonia mydas), LEATHERBACK TURTLE (Dermochelys Coriacea), SHIRLEY REYNOLDS and RITA ALEXANDER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a citizen has standing to sue a county government under the Endangered Species Act for permitting activities that take threatened and endangered species?

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OPINIONS BELOW

In addition to the opinions identified in Petitioner's statement, the United States District Court for the Middle District of Florida issued an order on September 16, 1996, denying Petitioner's motion for partial summary judgment as to beachfront lighting in unincorporated areas of Volusia County.

STATEMENT OF THE CASE

A. Proceedings Before the District Court

In June 1995, Respondents filed this action pursuant to section 9 of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1)(B), against Petitioner for taking threatened and endangered sea turtles through its harmful beach driving and lighting policies.[1] Appendix to the Petition for Certiorari [hereinafter "Pet. App."] 160. Contrary to the arguments in Petitioner's brief (Pet. i., 8-14), Respondents did not challenge a "failure to regulate." Instead, they sought, among other things, an injunction preventing Petitioner "from *permitting* vehicular traffic . . . on Volusia County beaches" and

> from *permitting* those artificial light sources for which it is responsible that misorient sea turtles to illuminate Volusia County beaches annually from May 1st through October 31st.

Pet. App. 179 (emphasis added). *See also id.* at 202.

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1. Under the ESA, taking or take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(18). *See also* 16 U.S.C. § 1538(g) ("It is unlawful for any person . . . to commit, . . . *or cause to be committed*, any offense defined in this section.") (emphasis added).

On August 1, 1995, the district court issued a preliminary injunction against Petitioner, prohibiting it from allowing beach driving at certain specified times and in certain locations. *Id.* at 119.[2] Rather than appealing the beach driving injunction, Petitioner applied to the U.S. Fish and Wildlife Service (FWS) for an Incidental Take Permit (ITP) which would enable it to continue to permit a limited amount of beach driving on the condition that it would implement conservation measures. *Id.* at 4-6, 72-73.

Petitioner thereafter filed two separate motions for partial summary judgment concerning its beachfront lighting policies. On July 9, 1996, the district court granted Petitioner's motion with respect to beachfront lighting in four incorporated municipalities, holding that Respondents lacked standing due to insufficient proof of causation and redressability. *Id.* at 89.[3] On September 16, 1996, the district court denied Petitioner's motion with respect to beachfront lighting in the unincorporated areas of Volusia County, holding that a "material factual issue exists as to whether the artificial beachfront lighting controlled by Volusia County's [sic] is responsible for 'taking' sea turtles." Order Denying Volusia County's Motion for Partial Summary Judgment, dated September 16, 1996 [hereinafter "September 16, 1996, Order"] at 1. Rather than proceeding to trial on whether it was responsible for permitting harmful beachfront lighting in unincorporated areas, Petitioner persuaded FWS to add

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2. The court denied Respondents' request for a preliminary injunction prohibiting the County from allowing artificial lighting that harms sea turtles. Pet. App. 115.

3. In the same Order, the district court denied Respondents' motion for leave to add the leatherback turtle as a party. Pet. App. 89.

beachfront lighting restrictions to its proposed ITP. The ITP was finalized and issued by FWS in November 1996. Pet. App. 6.

Petitioner subsequently filed a motion to dismiss the case, arguing that the ITP rendered moot Respondents' claims as to both beach driving and lighting. *Id.* at 71. Respondents conceded that their beach driving claims were moot, but argued that the lighting claims remained valid because incidental takings through lighting had not been expressly permitted in the ITP. *Id.* On December 20, 1996, the district court granted Petitioner's motion to dismiss, holding that incidental takings from artificial lighting were "within the scope" of the ITP even though not explicitly permitted. *Id.* at 74.

Throughout the proceedings before the district court, Petitioner never expressed any Tenth Amendment concerns about Respondents' efforts to hold it responsible for indirectly taking sea turtles through its beachfront lighting policies.

B. Proceedings Before the Court of Appeals

The Eleventh Circuit Court of Appeals reversed three district court rulings against Respondents and remanded for a trial on Respondents' beachfront lighting claims. First, it overturned the district court's ruling of December 20, 1996, holding that the ITP did not authorize incidental takings from beachfront lighting and that Respondents' claims concerning lighting were therefore *not* mooted by the ITP. *Id.* at 11-34, 63. Second, it overturned the district court's partial summary judgment ruling of July 9, 1996, holding that Respondents had standing to sue Petitioner under the ESA with respect to beachfront lighting harmful to sea turtles in four incorporated

municipalities. *Id.* at 35-55, 63. Third, it overturned the district court's July 9, 1996, order refusing to allow Respondents leave to add the leatherback turtle as a party. *Id.* at 56-64.

The court of appeals had no occasion to address the applicability of the Tenth Amendment to Respondents' claims because, as the court noted, Petitioner had failed to raise the issue. *Id.* at 53 n.26. Even after the court of appeals noted this failure, Petitioner filed a petition for rehearing in the appeals court that made no mention of the Tenth Amendment. *See* Suggestion for Rehearing En Banc (11th Cir. August 20, 1998).

C. Proceedings Before the District Court on Remand

After remand, the district court set a trial date of February 1, 2000. Thereafter, Petitioner voluntarily enacted a new beachfront lighting ordinance, superceding the ordinance (Pet. App. 152-59) that was at issue in the court of appeals. It also budgeted $100,000 for county staff to develop an ITP that, if approved by FWS, would render Respondents' beachfront lighting claims moot.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DECLINE REVIEW BECAUSE THE RULING BELOW IS NOT FINAL AND FURTHER PROCEEDINGS ARE NEEDED TO RESOLVE DISPUTED MATERIAL FACTS.

The court of appeals ruling at issue simply holds that Respondents have standing to sue Petitioner under the ESA for authorizing activities that take threatened and endangered sea turtles. According to the court of appeals, "the regulatory acts of governmental entities can cause takes of protected wildlife" because the "regulatory entity purports to make lawful an activity that allegedly violates the ESA." Pet. App. 46. As Petitioner concedes, this principle is not new — it is well-established in the ESA case law. *See* Pet. 12.

Rather than proceeding to trial on whether it has indeed authorized activities that take threatened and endangered sea turtles, Petitioner asks the Court to intervene before trial in reliance on Petitioner's highly-disputed version of the facts. The Court should reject this invitation and instead should follow its usual practice of declining to review interlocutory rulings. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993).

According to Petitioner, Respondents can never have their day in court because the Tenth Amendment precludes an ESA challenge to a county's "failure to regulate." Pet. i, 8. However, nowhere in the pleadings do Respondents contend that they are challenging a "failure to regulate."

Respondents' complaint seeks to enjoin Petitioner from affirmatively "permitting" beachfront lighting that harms threatened and endangered sea turtles. Pet. App. 202.[4] The proper venue for deciding the factual dispute of whether this case involves a mere failure to regulate (as Petitioner contends) or the affirmative act of permitting conduct harmful to sea turtles (as Respondents contend) is the district court.[5]

The inappropriateness of interlocutory review is highlighted by the fact that Petitioner seeks a determination of whether it can be "held responsible" under the ESA given the facts of this case. Pet. i. The Court's review of such an issue would be a gross waste of judicial resources because Petitioner's ESA liability, if any, has not yet been decided by the lower courts and the relevant facts upon which such a liability determination will be made are not yet known. The facts have changed significantly since the court of appeals ruling — for example, the ordinance under consideration in that ruling (Pet. App. 152-59) is no longer in effect — and could easily change again before trial. Indeed, because

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4. The court of appeals recognized that Respondents were challenging Petitioner's authorization of harm to threatened and endangered species, not a failure to regulate. *See* Pet. App. 51 ("Volusia County is alleged to be a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species") (citations and quotations omitted).

5. At trial, the district court will need to consider the extent to which Petitioner's recently-enacted lighting ordinance authorizes beachfront lighting harmful to sea turtles at both County-owned facilities and private facilities within Volusia County's unincorporated areas. The court will also need to consider Petitioner's role in causing harmful lighting within incorporated municipalities, taking into account both the new ordinance and the County's unique charter. *See* Pet. App. 143.

Petitioner has initiated the process of obtaining an ITP for beachfront lighting, there is a reasonable likelihood that this entire case will become moot before this Court could address the merits. The Court should reject Petitioner's invitation to speculate about whether ESA liability could be imposed under some hypothetical factual scenario that may or may not be presented to the district court.

II.

THE COURT SHOULD DENY THE PETITION BECAUSE THE ISSUE IT RAISES WAS NOT LITIGATED IN THE COURTS BELOW.

The sole issue on which Petitioner seeks review, whether the Tenth Amendment precludes a judicial interpretation of the ESA that would hold Petitioner responsible under that law for "failure to regulate" (Pet. i and 8-14), was never raised by Petitioner in the litigation below. *See* Pet. App. 53 n.26. Considering the complexity and importance of the issue, the district court and court of appeals should fully evaluate it before it is brought before this Court.[6] The Court should follow its usual practice of refusing to consider issues that have not been litigated in the lower courts. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998).

Petitioner argues that it expressed its Tenth Amendment concerns in the courts below by stating them in terms of

6. In the district court, Respondents would offer evidence of (among other things) extensive cooperative efforts among federal, state and local authorities on sea turtle conservation — efforts that directly undercut Petitioner's argument that ESA enforcement has resulted in federal intrusion into state and local affairs. *See* Pet. 8.

redressability and separation of powers between courts and legislatures. Pet. App. 12 n.3. However, the Tenth Amendment deals with the allocation of power between federal and state governments, not with the separation of powers between courts and legislatures. Therefore, nothing in Petitioner's arguments gave the courts below any inkling that Petitioner had concerns about federal intrusion into areas of state authority.

To the contrary, during most of this litigation Petitioner has accepted the very premise of Respondents' lawsuit that it now questions, *i.e.*, that a county's regulatory activities are subject to the restrictions of the ESA. For example, after the district court issued its preliminary injunction against authorizing beach driving that harms sea turtles, Petitioner elected not to appeal and instead applied to FWS for an ITP for beach driving. Pet. App. 5-6. Similarly, after the district court denied its motion for partial summary judgment concerning harmful beachfront lighting in the unincorporated areas of Volusia County (*see* September 16, 1996, Order), Petitioner elected not to go to trial and instead negotiated an expansion of its beach driving ITP to include beachfront lighting restrictions. Pet. App. 5-6.

Petitioner thereafter sought dismissal of Respondents' claims — not because of improper federal intrusion into its affairs, but because (according to Petitioner) the federal government had properly exercised its authority over Petitioner's activities insofar as they affect sea turtles and thereby rendered Respondents' claims moot.[7] In the court of

7. *See, e.g.*, Volusia County's Supplemental Motion to Dissolve Preliminary Injunction and Dismiss Case at 4 (M.D. Fla. Dec. 18, 1996) ("By issuing an Incidental Take Permit conditioned upon (Cont'd)

appeals, Petitioner likewise expressed satisfaction with federal involvement.[8]

Petitioner attempts to explain its failure to raise the Tenth Amendment issue in the courts below by arguing that the court of appeals ruling now "crystallizes the issue." Pet. 12 n.3. However, the ruling merely affirms that Respondents have standing to pursue their beachfront lighting claims, it does not alter those claims or specify the relief to which Respondents will be entitled if they prove liability. Petitioner has been aware of Respondents' claims since they were filed in 1995. Even assuming *arguendo* that those claims gave rise to a legitimate Tenth Amendment issue (as explained below, they do not), Petitioner was obligated to litigate that issue in the courts below before raising it in this Court.

III.

THE COURT SHOULD DECLINE REVIEW BECAUSE PETITIONER HAS IDENTIFIED NO CONFLICT IN THE CIRCUITS.

As Petitioner apparently concedes (*see* Pet. 12), there are no conflicts in the circuit courts that need to be resolved by this Court. The Eleventh Circuit court of appeals simply

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Volusia County's compliance with the ten separate items regarding beach lighting, the Department of the Interior has exercised its statutory authority and jurisdiction over the beach lighting issues").

8. *See, e.g.*, Answer Brief for Appellee at 24 (11th Cir. Aug. 13, 1997) ("FWS provided *reasonable requirements* [in the ITP] for correcting or minimizing takings from artificial lighting . . . .") (emphasis added).

followed a principle well-established in a long line of ESA rulings in other circuits — that a government agency is prohibited by section 9 from authorizing or permitting activities that take threatened or endangered species. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) (state agency violated section 9 by licensing commercial fishing operations in habitat of endangered whale), *cert. denied*, 119 S. Ct. 81 (1998); *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency illegally caused takes of the endangered black-footed ferret through its "decision to register pesticides even though other persons actually distributed or used the pesticides"); *Palila v. Hawaii Dep't of Land & Nat. Resources*, 639 F.2d 495, 497-98 (9th Cir. 1981) (state's practice of maintaining feral goats and sheep in habitat of endangered bird constituted a section 9 taking); *National Wildlife Federation v. Hodel*, 23 Env't Rep. Cas. (BNA) 1089, 1985 WL 186,671 (E.D. Cal. 1985) (federal agency's allowance of the use of lead shot ammunition resulting in poisoning of bald eagles is a section 9 taking).

Liability for authorizing activities harmful to threatened and endangered species is also consistent with this Court's ruling in *Babbitt v. Sweet Home Chapter of Better Communities for a Great Oregon*, 515 U.S. 687 (1995), which makes clear that liability is imposed under section 9 for both direct and indirect takings. *See, e.g., id.* at 698 n.11 ("harm" element of ESA's take prohibition conveys "sense of indirect causation").

Rather than attempt to identify a conflict in the circuits, Petitioner purports to identify a new principle in the court of appeals ruling — that liability can be imposed for the mere "absence of local legislative control." Pet. 12. However, the

ruling below does not stand for such a principle; nor can Respondents' pleadings fairly be interpreted as seeking to impose liability under this theory. Given that the district court has not yet had an opportunity to weigh the facts, the Court must disregard Petitioner's self-serving characterization of its conduct as a mere "failure to regulate" or "absence of local legislative control." Pet. i, 12.

IV.

THE ISSUE PRESENTED BY PETITIONER IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THE COURT'S REVIEW.

This case involves no important issues warranting the Court's review. Contrary to Petitioner's assertions, the ruling below does not implicate the Tenth Amendment issue addressed by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365 (1997). These cases stand for the proposition that under the Tenth Amendment, Congress cannot compel states to enact or enforce a federal program. *See New York*, 505 U.S. at 149 (Congress violated Tenth Amendment by forcing states to choose between taking title to low-level radioactive waste or regulating the waste according to the direction of Congress); *Printz*, 117 S. Ct. at 2384 (Congress violated Tenth Amendment by conscripting state officers for purpose of implementing federal gun control regulations).

In contrast, the ESA does not compel the states to take any action. Section 9, the provision that Respondents seek to enforce in this action, does not require an affirmative act; it merely prohibits any person (the definition of which includes states) from taking a threatened or endangered species.

16 U.S.C.§§ 1532(13), 1538(a)(1)(B). *See also* 50 C.F.R. § 17.31(a). Given the absence of language in section 9 compelling anyone to enact or enforce a regulatory program, the Tenth Amendment is simply not implicated in this case.[9]

Petitioner attempts to gloss over this basic defect in its Tenth Amendment argument by ignoring the language of section 9. Petitioner instead cites section 6(f) of the ESA, which authorizes state laws that are more restrictive than ESA regulations but prohibits state laws that are less restrictive. According to Petitioner, this provision demonstrates that the ESA is "preemptive, not coercive" with respect to the states, and the court of appeals has violated this ESA principle by requiring it "to adopt a . . . local regulatory scheme in order to avoid liability." Pet. 13. In essence, Petitioner seeks to prove that the court of appeals infringed upon its Tenth Amendment rights by violating ESA section 6(f).

This argument, which Petitioner failed to raise in the courts below, is without merit because it relies upon an inaccurate characterization of the court of appeals ruling. In upholding Respondents' standing to sue, the court of appeals made clear that it was not deciding what relief, if any, Respondents would be entitled to if they were to prevail in the district court. Pet. App. 53-54, 63.[10] In the absence of any

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9. Because section 9 applies broadly to any person and is not targeted at the states, the Tenth Amendment concerns expressed by the Court in *New York* and *Printz* are particularly remote from this case. *See Printz*, 117 S. Ct. at 2383 (*per se* rule of Tenth Amendment applicability used in *New York* and *Printz* does not apply in cases involving "application to the States of a federal law of general applicability").

10. Rather than deciding that Respondents are entitled to a particular remedy, the court of appeals simply identified a range of

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ruling regarding Respondents' entitlement to relief, Petitioner has no basis for arguing that the court of appeals adopted a "coercive" rather than "preemptive" approach. This Court will not be in a position to evaluate whether section 6(f) has been violated unless and until the district court awards relief and that ruling has been reviewed by the court of appeals.

Finally, Petitioner reveals another serious defect with its Tenth Amendment argument by clarifying that it is not challenging any congressional usurpation of local decisionmaking, but merely contending that local decisionmaking has been "judicially commandeered." *See* Pet. 12 n.3. There is no basis for such an argument under the Tenth Amendment. Although the Tenth Amendment prohibits *Congress* from forcing state officials to implement a federal program, it does not prevent the federal *courts* from requiring state officials to comply with federal law. *See New York*, 505 U.S. at 179.

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possible remedies that would not violate the constitutional principle of separation of powers. Pet. App. 53-55. Petitioner has not sought this Court's review of the court of appeals ruling on the separation of powers issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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